NIK ASMAWI NIK DAUD

v.

PP

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: J-05-27-2005]
30 NOVEMBER 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B - Trafficking 29,345.5 grams cannabis - Appeal against conviction and death sentence - Failure to call witnesses - Whether warranted invocation of adverse inference - Failure to clarify ownership of vehicle used to transport drugs - Failure to show exclusivity of possession of drugs - Whether unsafe to uphold conviction of trafficking - Whether ample ground for appellate interference - Dangerous Drugs Act 1952, ss. 6, 39A(2)*

The appellant was charged at the High Court under s. 39B(1)(a) punishable under s. 39B(2) of the Dangerous Drugs Act 1952 (the Act) for trafficking 29,345.5 grams of cannabis. At the end of the prosecution's case, the judge amended the charge to one of possession under s. 6 of the Act punishable under s. 39A(2) of the same Act, and ordered the appellant to enter his defence on the said amended charge. He pleaded guilty to it and was sentenced to 15 years of imprisonment and 10 strokes of whipping. On appeal to the Court of Appeal by the prosecution, the court ('first panel') reversed the decision of the judge and directed the appellant to enter his defence on the original charge of trafficking. At the end of the full trial, the judge held that the appellant had failed to raise any reasonable doubt on the prosecution's case and was convicted under the original charge of trafficking and sentenced to death. Hence, the appellant appealed.

Held (allowing the appeal; setting aside the conviction order; imposing a sentence of 20 years imprisonment)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) The cautioned statement tendered *ie*, P20 showed that the appellant had admitted one Lazim had asked him to send the cannabis to his friends, Najib and Taib. The appellant had

made mention of one Lazim, Najib and Taib but yet at the close of the prosecution's case, those named persons were never investigated, called or offered. These people were certainly not fictitious persons as their names cropped up during the prosecution's case. This failure to do any of the mentioned acts by the prosecution was a serious omission which warranted the invocation of adverse inference provision. Any lingering doubt of whether the appellant actually knew the contents of the gunnysacks found in the boot of the car driven solely by the appellant could have been dispelled, had the named persons on the cautioned statement been investigated. Even though s. 114(g) of the Evidence Act was a permissible inference and even though there was no obligation on the prosecution to examine all witnesses mentioned by the appellant, this panel could certainly invoke this adverse inference if the prosecution were influenced by some oblique motive. The adverse inference to be attached to the non-calling of Lazim was that had he been called it would have cast some doubt whether the appellant had any knowledge of the drugs. Without knowledge, there could be no possession. (paras 17 & 18)

(2) The prosecution never attempted to clarify the ownership of the car the appellant was driving (WBK 6708) in which the appellant was arrested. The testimony of the appellant was never challenged when he testified that one Sulaiman *ie*, the brother of Lazim owned the vehicle. Without any cross-examination on this issue of ownership, the court thus must accept the testimony of the appellant. For the prosecution to succeed in obtaining a conviction it must establish not only that the appellant had knowledge of the existence of the drugs but that he had exclusive custody and control of them. With the prosecution failing to establish that the appellant was the owner of the vehicle, and with the testimony of the appellant standing unchallenged, the ownership must fall on Sulaiman. That being so with Lazim as the last person to have custody of the vehicle, before being commandeered by the appellant, and Sulaiman as the actual owner, it was not inherently improbable that they separately, or perhaps in concert, had left the drugs in the boot of the car. The appellant's role would be the innocent and momentary courier and this defence was not without merit. Without any duty imposed on the appellant to absolve himself of the ownership of the drugs at the prosecution's stage let alone there was no exclusivity of possession of the drugs,

strengthened by a credible defence of innocent carrier, the position of the prosecution thus was untenable. (paras 20, 21 & 22)

(3) It was unsafe for this panel to uphold the conviction of trafficking, in light of the nonchalance of the prosecution that attracted the adverse inference, the failure to establish exclusive possession, and the subsequent unexplained radical shifting of stance, be they for the establishment of the ingredients of possession or trafficking. The shifting of stance for the establishment of the ingredient of trafficking clearly militated against the prosecution's case which also effectively derailed the defence of the appellant. Due to the seriousness of the error there was thus ample ground for appellate interference (*Chow Kok Keong v. Public Prosecutor*). In substitution, the appellant was found guilty of an offence under s. 6 of the Act read together with s. 39A(2) of the same Act and accordingly convicted him. (para 33)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dituduh di Mahkamah Tinggi di bawah s. 39B(1)(a) yang boleh dihukum di bawah s. 39B(2) Akta Dadah Berbahaya 1952 (Akta) atas pengedaran 29,345.5 gram cannabis. Di akhir kes pendakwaan, hakim telah meminda pertuduhan ke pertuduhan milikan di bawah s. 6 Akta yang boleh dihukum di bawah s. 39A(2) Akta yang sama, dan memerintah perayu memasuki pembelaan atas pertuduhan yang dipinda itu. Tertuduh mengaku salah dan dihukum penjara 15 tahun dan 10 sebatan. Dalam rayuan ke Mahkamah Rayuan oleh pihak pendakwaan, mahkamah ('panel pertama') telah menterbalikkan keputusan hakim dan mengarahkan perayu memasuki pembelaan atas pertuduhan original iaitu pertuduhan pengedaran. Di akhir perbicaraan penuh, hakim memutuskan bahawa perayu telah gagal menimbulkan keraguan munasabah ke atas kes pendakwaan dan disabitkan di bawah pertuduhan original pengedaran dan menjatuhkan hukuman mati. Oleh itu, perayu merayu.

Diputuskan (membenarkan rayuan; mengenepikan perintah sabitan; mengenakan hukuman penjara 20 tahun)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Pernyataan beramaran yang diserahkan iaitu P20 menunjukkan bahawa perayu telah membuat pengakuan bahawa satu Lazim telah menyuruhnya menghantar cannabis ke kawan-kawannya

satu Najib dan satu Taib. Perayu telah menyebut satu Lazim, satu Najib dan satu Taib tetapi pada akhir kes pendakwaan, mereka yang dinamakan itu tidak disiasat, dipanggil atau dibekalkan. Orang-orang ini bukanlah orang-orang yang tidak wujud kerana nama-nama mereka dibangkitkan semasa kes pendakwaan. Kegagalan untuk melaksanakan tindakan-tindakan tersebut oleh pihak pendakwaan adalah peninggalan yang serius yang mewajarkan penggunaan peruntukan inferensi yang bertentangan. Apa-apa keraguan yang timbul mengenai sama ada perayu sebenarnya berpengetahuan mengenai kandungan bag-bag guni yang dijumpai di dalam boot kereta yang dipandu oleh perayu seorang boleh dihilangkan, jikalau orang-orang yang dinamakan di dalam pernyataan beramaran disiasat. Walaupun s. 114(g) Akta Keterangan 1950 adalah inferens yang dibenarkan and walaupun tidak terdapat obligasi atas pihak pendakwaan untuk memeriksa semua saksi-saksi yang disebut oleh perayu, panel ini boleh menggunakan inferensi yang bertentangan jikalau pihak pendakwaan dipengaruhi oleh motif yang tidak jujur. Inferensi yang bertentangan yang berkaitan dengan kegagalan memanggil Lazim adalah jikalau Lazim dipanggil ia akan menimbulkan keraguan sama ada perayu mempunyai pengetahuan mengenai dadah-dadah berbahaya tersebut. Tanpa pengetahuan, tidak wujudnya milikan.

(2) Pihak pendakwaraya tidak cuba untuk menjelaskan pemilik kereta yang dipandu perayu (WBK 6708) di mana perayu ditangkap. Testimoni perayu tidak dicabar apabila beliau memberi keterangan bahawa terdapat satu Sulaiman iaitu abang kepada Lazim yang memiliki kereta tersebut. Tanpa periksa balas mengenai isu milikan, mahkamah mesti menerima testimoni perayu. Untuk pihak pendakwaan berjaya mendapatkan sabitan ia perlu membuktikan bahawa perayu mempunyai pengetahuan mengenai kewujudan dadah-dadah tersebut dan juga mempunyai jagaan dan kawalan ekslusif dadah-dadah tersebut. Dengan kegagalan pihak pendakwaan untuk membuktikan perayu adalah pemilik kereta tersebut, dengan testimoni perayu yang tidak dicabar, milikan mestilah jatuh kepada Sulaiman. Dengan Lazim sebagai orang yang terakhir mempunyai jagaan ke atas kereta itu, sebelum memberinya kepada perayu, dan Sulaiman sebagai pemilik yang sebenar, ia tidaklah mustahil yang mereka secara berasingan, ataupun bersama-sama telah meninggalkan dadah-dadah tersebut di dalam but kereta tersebut. Peranan perayu hanyalah pengirim buat sementara

yang tidak bersalah dan pembelaan ini tidaklah tanpa merit. Tanpa tanggungjawab yang dikenakan ke atas perayu untuk membebaskan dirinya dari milikan dadah-dadah tersebut pada tahap kes pendakwaan dan dengan tidak terdapatnya milikan eksklusif dadah-dadah tersebut, dikuatkan lagi dengan pembelaan yang boleh dipercayai iaitu sebagai pengirim yang tidak bersalah, maka pihak pendakwaan berada di dalam keadaan yang tidak boleh dipertahankan.

(3) Ia tidak selamat untuk panel ini mempertahankan sabitan pengedaran, memandangkan sikap endah tak endah pihak pendakwaan yang telah menarik inferensi yang bertentangan, kegagalan untuk membuktikan milikan ekslusif, dan penukaran pendirian secara radikal dan tanpa penerangan, untuk pembuktian bahan-bahan milikan dan pengedaran. Penukaran pendirian untuk pembuktian bahan-bahan dengan jelasnya bercanggah dengan kes pihak pendakwaan yang telah menyebabkan pembelaan perayu terkeluar dari landasan. Atas sebab kesalahan yang terjadi adalah amat serius oleh itu terdapat alasan-alasan yang mencukupi untuk campurtangan rayuan (*Chow Kok Keong v. PP*). Dalam penggantiannya, perayu didapati bersalah atas kesalahan di bawah s. 6 Akta dibaca dengan s. 39A(2) Akta yang sama dan mensabitkan perayu.

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Choo Yoke Choy v. PP [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Lim Hock Boon v. PP [2007] 4 CLJ 114 CA ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Ong Ah Chuan v. PP [1980-1981] SLR 48 ***(refd)***
PP v. Kau Joo Huat [1988] 1 CLJ 477; [1988] 1 CLJ (Rep) 258 SC ***(refd)***
PP v. Lim Ah Bek [1989] 2 CLJ 1090; [1989] 2 CLJ (Rep) 391 HC ***(refd)***
Soorya Kumar Narayanan v. PP [2009] 6 CLJ 257 CA ***(refd)***
Toh Ah Loh & Mak Thim v. Rex [1948] 1 LNS 72 HC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***
Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 182A(1)
Dangerous Drugs Act 1952, ss. 2, 6, 37(da), 39A(2), B(1)(a), (2)
Evidence Act 1950, s. 114(g)

For the appellant - Gurbachan Singh Bagawan Singh; M/s Bachan & Katar
For the respondent - Mangaiarkarasi Krishnan; AG's Chambers

[Appeal from High Court, Muar; Criminal Trial No: 47-2-1997]

Reported by Suhainah Wahiduddin

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The appellant was charged at the High Court under s. 39B(1)(a) punishable under s. 39B(2) of the Dangerous Drugs Act 1952 (the Act), for trafficking 29,345.5 grams of cannabis on 23 June 1996. At the end of the prosecution's case, the learned judge amended the charge to one of possession under s. 6 of the Act punishable under s. 39A(2) of the same Act, and ordered the appellant to enter his defence on the said amended charge. He pleaded guilty to it and sentenced to 15 years of imprisonment and ten strokes of whipping. That took place on 11 March 1998.

[2] On appeal to the Court of Appeal by the prosecution, the court (hereinafter referred to as the first panel) on 29 November 2004, reversed the decision of the learned judge and directed the appellant to enter his defence on the original charge of trafficking (referred to as the original charge of trafficking). He elected to give sworn evidence but did not call any other witness. At the end of the full trial, the learned judge held that the appellant had failed to raise any reasonable doubt on the prosecution's case, and thereupon was convicted under the original charge of trafficking, and sentenced to death. The appellant then filed this appeal hence the matter before us. For easy reference we will refer to the respondent as the prosecution throughout.

[3] The original charge of trafficking reads as follows:

> Bahawa kamu pada 23hb Jun 1996 jam lebih kurang 5.15 petang di hadapan kedai makan di Simpang Tiga Lebuhraya Segamat/ Kuantan, Segamat, dalam daerah Segamat dalam Negeri Johor, telah didapati mengedar dadah berbahaya, iaitu 29,345.5 gram

> cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[4] Regretfully we did not have the benefit of any ground of judgment from the first panel and thus the learned judge and this panel suffered the same handicap. We were unable to conclusively state whether the first panel had found that there was an affirmative finding of possession combined with actual trafficking, possession based on presumption followed by actual trafficking say under s. 2 of the Act, or an affirmative possession followed by presumed trafficking under s. 37(da) of the Act (*Soorya Kumar Narayanan v. PP* [2009] 6 CLJ 257; *Ong Ah Chuan v. PP* [1980-1981] SLR 48). We could only infer that the order of the first panel must have been on the third suggestion ie, an affirmative finding of possession coupled with the presumed trafficking under s. 37(da) of the Act. This view was arrived at as there was no other basis for such an order except for what was canvassed by the prosecution at p. 143 of the Rekod Rayuan, which reads:

> Saya ada penghujahan bertulis. Membacakan penghujahan ... Tertuduh tahu barang yang dibawa ialah dadah ganja. Anggapan seksyen 37(da)(vi).

[5] The thinking of the learned judge was well documented in two grounds of judgment prepared by him, respectively for the amended charge (ie, first judgment) and conviction of the original charge of trafficking (second judgment).

[6] The prosecution's evidence, upon which the Court of Appeal had concluded that a *prima facie* case of trafficking had been established and thereupon ordered the defence to be called is as follows. Acting on information, at about 2pm on 23 June 1996, a group of eight police officers, headed by ASP Nordin bin Idris (SP5) from the Jabatan Narkotik Johor Bahru went to Segamat to lay an ambush. There SP5 divided the group into two teams, the first headed by SP5, and the second team headed by D/Sjn Badron bin Ismail. The first team stationed itself at the Petronas petrol station near the T-junction of Segamat/Kuantan whilst the second team waited at KM14, Lebuhraya Segamat/Kuantan.

[7] At about 5.10pm, the suspect car bearing registration No. WBK 6708 passed by the second team and it relayed the information to SP5. When the car reached the T-junction where the first group was stationed, the first group trailed the car. On seeing

A the car stopping at the nearby restaurant, SP5 went towards it. He saw the appellant opening the car door. There was no other person in it. SP5 approached the appellant and introduced himself. As the appellant attempted to run away, SP5 had to chase after him for about five meters before arresting him. SP5 opened the boot of the
B car using the ignition key. From the car boot, SP5 seized two gunnysacks, with each containing 15 slabs of dried leaves believed to be cannabis.

[8] The prosecution then successfully tendered his cautioned
C statement ie, P20. The relevant part of the cautioned statement reads as follows:

> S: Adakah sesiapa memujuk, memaksa atau berjanji dengan kamu supaya memberi percakapan kepada saya?
>
> D J: Tiada.
>
> S: Adakah apa-apa yang hendak kamu katakan kepada saya?
>
> J: Ada. Ganja yang dirampas itu bukan saya punya, ianya kepunyaan Lazim. Lazim yang menyuruh saya hantar ke
> E Segamat. Lazim suruh saya serahkan kepada Najib dan Taib di Segamat. Ini sahaja yang hendak saya katakan.

[9] From the above excerpt the appellant had admitted that Lazim had asked him to send the cannabis to his friends Najib and Taib.

F

[10] At the close of the defence case, it was thus incumbent upon the learned judge to undertake a maximum evaluation exercise of the evidence adduced at the prosecution and defence stage, and thereafter decide whether the prosecution had successfully established
G a case beyond reasonable doubt. This he did and eventually concluded that the prosecution indeed had proven its case beyond reasonable doubt. He supplied reasons for the conviction of the appellant of the trafficking charge, and as said above, in his second judgment.

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[11] Let us pore over the evidence of the defence again. In his defence, he gave evidence that he lived in Jerteh in the State of Terengganu. He had planned to go to Johor together with his friend Lazim who was a batik trader, to attend the wedding of his adopted
I brother at Kulai, to be held on 24 June 1996. On 23 June 1996 Lazim came to his house driving a car bearing registration number WBK 6708. The latter told him that he could not go to Johor and

instead asked the appellant to drive alone with his elder brother's car ie, one Sulaiman. Lazim also asked the appellant to help him send some kain batik to his friends Najib and Taib, at a restaurant known as Sinar Suria in Segamat. He testified that Lazim told him that the kain batik was in the car boot in gunnysacks. The appellant saw the gunnysacks but did not open them in order to check the contents. When arrested the appellant did not tell PW5 that he was enroute to the wedding ceremony in Kulai or that he was delivering kain batik to Najib and Taib. He also did not tell SP5 that the gunnysacks contained kain batik. He denied he attempted to escape or that a struggle took place between him and the police. Even at the time his statement was recorded, the accused never informed the recording officer about the kain batik.

[12] Since a maximum evaluation of the evidence at the end of the defence case entails re-evaluation of all the evidence adduced in the course of the hearing, inclusive of that adduced by the prosecution, we now discuss the essential ingredients of the charge and other salient issues. It was the evidence of the appellant that he only knew of the actual contents of the gunnysacks, after the police had opened them at the time of his arrest, and told him of them. It was also his evidence that the reference to ganja (cannabis) in P20 was the kain batik.

[13] As regards the usage of the word ganja the learned judge had occasion to write the following in his grounds of judgment:

> Mengenai P20 tersebut, tertuduh dalam keterangannya telah menjelaskan bahawa ganja yang beliau maksudkan semasa memberikan P20 ialah kain batik. Menurut tertuduh semasa Lazim meminta beliau membawa kedua-dua guni plastik ke Segamat beliau tidak tahu isi kandungannya adalah ganja. Menurutnya pertama kali beliau tahu kandungan kedua-dua guni plastik tersebut adalah ganja adalah apabila polis membuka kedua-dua guni plastik tersebut. Jadi, menurut tertuduh, apabila beliau memberikan P20, beliau telah tahu isi kandungan kedua-dua plastik tersebut adalah ganja. Dengan itu beliau merujuknya sebagai ganja di dalam P20 tersebut apabila ditanya mengenainya.

[14] If the learned judge had believed the appellant or even had some doubt of his knowledge, by the flow of events and sequence, which culminated in P20, it would be reasonable for him by then to refer to the contents as ganja rather than kain batik. Putting it another way, to continue referring to the contents as kain batik would be rather unusual if by then he already knew it was cannabis.

A Unfortunately for the appellant, the learned judge disbelieved him, as, the learned judge opined that it was improbable that he did not know the contents of the gunnysacks were cannabis. His eventual decision in no small way was influenced by P20's contents, which hinged on the play of words.

B

[15] Undeniably, to be fair to the learned judge, he had some basis when he disbelieved the appellant. He viewed that if it were true that the appellant believed that the gunnysacks contained kain batik, he should have told the police of the contents when arrested,
C or at least inform the investigating officer at the earliest opportunity. The appellant too had not raised the issue of kain batik during the prosecution's stage and hence concluded that the defence was an afterthought. His act of running away, when PW5 introduced himself was of no help to the appellant especially if he
D had believed that he was carrying kain batik.

[16] We now touch on the reasons why we eventually amended the charge. It is a fact that P20 ie, the cautioned statement was tendered by the prosecution. That being so, the prosecution must
E stand by every material strand of the contents, and cannot be discriminating unless any of the information is inherently improbable. If any of the contents were material, and unwittingly had weakened the prosecution's evidence or helped the appellant's case in some way, then the prosecution must inevitably acquiesce to
F the repercussion of its course of action, if any. Naturally, the appellant will be entitled to reap the benefits flowing from the chinks in P20. From the flow of the contents or its very contents, if it has led to some reasonable doubt creeping into the mind of the learned judge that he knew the contents of the gunnysacks, he
G then is entitled to the acquittal (*Mat v. PP* [1963] 1 LNS 82). Even if the court rejects his explanation, the court must still test that explanation with the prosecution's case and determine whether a reasonable doubt has been raised. It is never the legal proposition that the court has to believe the appellant before acquitting him.

H **[17]** We had to bear in mind that P20, like a double-edged saw, had cut across the prosecution's and the appellant's case. The appellant had made mention of Lazim, Najib and Taib but yet at the close of the prosecution's case, as reflected at p. 139 of the Rekod Rayuan, those named persons were never investigated, called
I or offered. These people were certainly not fictitious persons as their names cropped up during the prosecution's case. This failure to do

any of the mentioned acts by the prosecution, at the very least over Lazim, was a serious omission, which warranted the invocation of this adverse inference provision. With so much at stake, any lingering doubt of whether the appellant actually knew the contents of the gunnysacks could have been dispelled, had the named persons in the cautioned statement been investigated. Even though s. 114(g) of the Evidence Act is a permissible inference and even though there is no obligation on the prosecution to examine all witnesses mentioned by the appellant, this panel could certainly invoke this adverse inference if the prosecution were influenced by some oblique motive. *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 when laying down the test of invoking adverse inference under s. 114(g) of the Evidence Act remarked:

> It is essential to appreciate the scope of s. 114(g) lest it be carried too far outside its limits. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[18] Scrutinizing the notes of proceedings, the flaw of the prosecution's case was compounded further by the want of explanation of the nonchalance. In the circumstances of the case, an inference drawn in the appellant's favour is warranted (*Lee Kwan Woh v. PP* [2009] 5 CLJ 631; *Public Prosecutor v. Lim Ah Bek* [1989] 2 CLJ 1090; [1989] 2 CLJ (Rep) 391).

[19] Of Lazim, in the first judgment, even the learned judge had occasion to state:

> P20 menunjukkan bahawa dadah tersebut adalah kepunyaan Lazim untuk diserahkan kepada Najib atau Taib di Segamat. Walau bagaimanapun tidak ada keterangan yang dikemukakan oleh pihak pendakwaan melalui pegawai penyiasat kes ini mengenai tindakan yang diambil berikutan dengan pengakuan yang dibuat oleh tertuduh tersebut. Tanpa penyiasatan dibuat, ada kemungkinan Lazim, Najib atau Taib tersebut yang menjadi pengedar sebenar dalam kes ini. Tertuduh hanya memilikinya sementara menunggu diambil oleh Najib atau Taib.

[20] Even though it could be argued that the first judgment would be inapplicable, the fact that the first panel never supplied any ground of judgment to explain its decision, gives us the window of

A opportunity to gauge the above opinion. In light of the appellant's evidence at the stage of the defence, what more a court must carry out a maximum re-evaluation of the evidence at the close of the defence case, it legitimized us to peruse the first judgment. The above opinion of the learned judge was not without merit. The
B adverse inference to be attached, amongst others, to the non-calling of Lazim is that had he been called it would have cast some doubt whether the appellant had any knowledge of the drugs. Without knowledge there can be no possession. As Gordon Smith, Acting CJ in *Toh Ah Loh & Mak Thim v. Rex* [1948] 1 LNS 72 said:

C

> Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, (and must have in him a power of disposal over the thing), and lastly must be conscious of his possession of the thing.

D (*Public Prosecutor v. Kau Joo Huat* [1988] 1 CLJ 477; [1988] 1 CLJ (Rep) 258 has made the legal requirement of power of disposal obsolete)

[21] Apart from the failure to investigate, call, offer or supply some
E explanation regarding Lazim, Najib or Taib, the prosecution at its stage likewise never attempted to clarify the ownership of that car (WBK 6708), in which the appellant was arrested. The testimony of the appellant was never challenged when he testified that Sulaiman ie, the brother of Lazim owned the vehicle. Without any cross-
F examination on this issue of ownership, the court thus must accept the testimony of the appellant (*Wong Swee Chin v. Public Prosecutor* [1980] 1 LNS 138). In his evidence, the appellant too testified that Lazim had handed over another person's car to him, and driven solo from Terengganu to Johore. As regards the ownership of this car,
G the learned judge had authored:

> Tambahan lagi tidak diketahui siapakah pemilik kereta WBK 6708 yang dipandu oleh tertuduh. Tidak ada keterangan yang dikemukakan oleh pihak pendakwa mengenai perkara ini. Ini menimbulkan tanda tanya yang tidak dijawab oleh pihak pendakwa.

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[22] For the prosecution to succeed in obtaining a conviction it must establish not only that the appellant had knowledge of the existence of the drugs but that he had exclusive custody and control of them (*Chan Pean Leon v. Public Prosecutor* [1956] 1 LNS
I 17; *Choo Yoke Choy v. Public Prosecutor* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43). With the prosecution failing to establish that the

appellant was the owner of the vehicle, and with the testimony of the appellant standing unchallenged, the ownership must fall on Sulaiman. That being so with Lazim as the last person to have custody of the vehicle, before being commandeered by the appellant, and Sulaiman as the actual owner, it was not inherently improbable that they separately, or perhaps in concert had left the drugs in the boot of the car. The appellant's role would be the innocent and momentary courier and this defence, which was enunciated in *Mohamad Radhi Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 and *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773, is not without merit. Lazim is a real person and not a mere figment of the appellant's imagination invented for the purpose of the trial. He was introduced by the prosecution *vide* P20. Without any duty imposed on the appellant to absolve himself of the ownership of the drugs at the prosecution's stage let alone there was no exclusivity of possession of the drugs, strengthened by a credible defence of innocent carrier, the position of the prosecution thus was untenable.

[23] We now touch on the approaches applied in the first and second judgments of the learned judge. It was obvious that there were distinct and fundamental shifts in the approach of the learned judge in them hence the need for this discussion. It was clear that the learned judge had invoked the presumption of knowledge under s. 37(d) of the Act and the presumption of trafficking under s. 37(da) of the Act in the first judgment before deciding that the appellant had rebutted the presumption of trafficking. The learned judge ventilated in the latter judgment as follows:

> Atas fakta tersebut anggapan statutory di bawah seksyen 39(d) ADB telah timbul terhadap tertuduh iaitu tertuduh adalah sehingga dibuktikan sebaliknya dianggap memiliki cannabis tersebut dan adalah dibuktikan sebaliknya juga dianggap mengetahui sifat dadah tersebut.
>
> Dadah yang dimiliki oleh tertuduh ialah seberat 29,345.5gm. Menurut seksyen 37(da)(vi) seseorang yang memiliki 200 gram atau lebih dadah cannabis adalah dianggap sebagai mengedar dadah tersebut sehingga dibuktikan sebaliknya. Memandangkan dadah yang dimiliki oleh tertuduh adalah melebihi 200 gram maka anggapan di bawah seksyen 37(da)(vi) telah juga timbul terhadap tertuduh.

[24] As the learned judge had found that the ingredient of trafficking had been rebutted the charge was reduced to s. 6 of the Act read together with s. 39A of the same Act. The basis for the rebuttal of trafficking was premised on the drugs having been owned by Lazim, the person who had directed the appellant to hand over the drugs to Najib and Taib.

[25] It must be highlighted that the first judgment was prepared on 11 March 1998 whilst *Muhammed Hassan v. Public Prosecutor* [1998] 2 CLJ 170 was decided on 7 December 1997. Without any grounds of judgment supplied by the first panel to clarify matters, let alone nothing had been recorded in the notes of proceedings to indicate *Muhammed Hassan v. Public Prosecutor* had been discussed at anytime, we were thus not in a position to comment about it. We therefore are unable to give any reason why the legal effect of the latter case, which rejected the invocation of double presumption was accorded insufficient consideration by the first panel.

[26] Notwithstanding that, a maximum evaluation exercise must be undertaken at the close of the defence, whereupon the learned judge must consider all the evidence adduced as provided for under s. 182A(1) of the Criminal Procedure Code (*Balachandran v. PP* [2005] 1 CLJ 85). As the appellant had not remained silent, not only was there a need to test the veracity of his evidence against the prosecution's evidence, but also all the possible legal considerations alluded to by the learned judge and the first panel. Unfortunately, the reconsideration of the invocation of the double presumptions never took place, as the learned judge abandoned them and thus avoided the earlier obvious errors.

[27] We begin the discussion with the earlier invocation of the presumption provision by the learned judge, as reflected in the first judgment. Come the end of the trial in the reinstated trafficking charge, when intending to establish the ingredient of possession, the learned judge had changed his stance. Instead of adverting to the same provision of s. 37(d) of the Act he instead shifted to direct evidence to establish possession. The abandonment of the allusion to that statutory provision is obvious, as reflected in the second judgment, when the learned judge made no further mention of his previous stance on this matter. Instead, and without supplying any reason, he simply stated that possession here was affirmative rather than presumptive. He said:

> Dari keterangan yang terdapat didalam kes ini, saya dapati tertuduh ada pengetahuan bahawa kandungan didalam kedua-dua guni plastic adalah ganja.

[28] That radical change of stance from s. 37(d) to affirmative possession bothered us considerably, as no change in the status of the prosecution's case had ever taken place. The first panel had meted down no order of retrial that could have permitted the calling of new witnesses or even recalling former witnesses; or for that matter any direction having been given, stating that affirmative possession had successfully been established. In a nutshell there was no new material before the learned judge which could have justified this change of stance.

[29] The only saving factor that could have justified the learned judge in alluding to the finding of affirmative possession, like that of the first panel, must be the contribution of the prosecution's submission at the abovementioned p. 143 of the Rekod Rayuan. On the other hand, we could not avoid asking ourselves how that finding could be supported, in light of the adverse inference drawn, no exclusivity of possession having been established, and the existence of a credible defence of being an innocent carrier.

[30] The second connected matter, which caught our attention, was the radical shift of position by the learned judge when attending to the ingredient of trafficking. At the risk of repeating, despite the want of any specific factual directions by the first panel, the learned judge when resolving this ingredient, had abandoned his original allusion to s. 37(da) of the Act and instead invoked s. 2 of the Act. He said thus:

> Perbuatan tertuduh itu tergulung kepada perbuatan mengedar dadah seperti yang didefinisikan dibawah s. 2 Akta Dadah Berbahaya 1952.

[31] Again no explanation was offered for this shift of position. By invoking s. 2 of the Act, aside from departing from his original stance, the learned judge had substituted the prosecution's case, which had clearly alluded to s. 37(da) of the Act (see again p. 143 of the Rekod Rayuan) in order to establish the ingredient of trafficking. In *Lim Hock Boon v. PP* [2007] 4 CLJ 114 the court had occasion to criticize the prosecution for switching the premise of its prosecution at the end of the case much to the disadvantage of the accused person. The court said:

A Throughout its case, the prosecution proceeded on the basis that it was relying on s. 37(da). The accused also presented his case along the lines that the prosecution was relying purely on s. 37(da) of the Act. That much is clear from the appeal record. To resort to the wide and untrammeled definition in s. 2 of the Act at the end of the case, being quite ineffective as a matter of law, would be unfair and unjust to the accused.

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[32] A fundamental error, as in the above case, had occurred in this appeal, as the appellant had tailored his defence based on a rebuttal of a presumptive provision as indicated by the prosecution at the end of its case, as opposed to an allegation of trafficking founded on direct evidence. At no time did the prosecution suggest the latter approach as its alternative argument. By the appellant being caught flat-footed due to the unexplained shifting of position by the learned judge, an injustice had taken place.

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[33] To reiterate, in the circumstances of the case it was rather unsafe for this panel to uphold the conviction of trafficking, in light of the nonchalance of the prosecution that attracted the adverse inference, the failure to establish exclusive possession, and the subsequent unexplained radical shifting of stance, be they for the establishment of the ingredients of possession or trafficking. The shifting of stance for the establishment of the ingredient of trafficking clearly militated against the prosecution's case, which also effectively derailed the defence of the appellant. Due to the seriousness of the error there was thus ample ground for appellate interference (*Chow Kok Keong v. Public Prosecutor* [1998] 2 CLJ 469). We thereupon allowed the appeal and set aside the conviction order. In substitution, we found the appellant guilty of an offence under s. 6 of the Act read together with s. 39A(2) of the same Act and accordingly convicted him. We imposed a sentence of 20 years imprisonment, with effect from the date of arrest, and 10 strokes of the rotan.

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